

Common Interests

The Newsletter of the Virginia Common Interest Community Board

Spring 2021: Things are Looking Up



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Disclaimer:

The information in this newsletter is intended to provide a summary of various updates and actions. It does not contain all information and should not be relied upon exclusively. Please contact the Board's office if you would like more information regarding the topics covered in this newsletter.

Spring's Greetings! This is the Spring 2021 edition of *Common Interests*, the newsletter for the Common Interest Community Board. Springtime is seen by many as a period for growth and renewal; a season for optimism. Hopefully, this newsletter finds its readers with similar sentiments. This past March marked one year since the Commonwealth was first faced with the COVID-19 public health emergency. As of this writing, millions of Virginians have received a COVID-19 vaccination, with many more expected to be vaccinated in the weeks and months ahead. Conditions are improving, and restrictions imposed over the past year are gradually being lifted. Many are starting to return to life as it was known pre-pandemic. Businesses, public venues, and other community gathering spaces have been opening up, even if at limited capacity.

Along this front, the Governor recently announced that Virginia will ease all distancing and capacity restrictions on May 28; and further announced an end to the state's universal indoor mask mandate. These changes no doubt come as a relief to many. The state of emergency declared by the Governor in March 2020, will end effective June 30, 2021.

As a result of the ending of the state of emergency, several temporary waivers of regulations issued by the Director of DPOR over the last year will be expiring. These include the regulatory waiver extending the validity of common interest community manager licenses, principal or supervisory employee certificates, and common interest community association registrations. (See Pages #3-4 for more on this.)

For the time being, the Department remains closed to the public. The Board's staff continue alternate days working in the office, and working remotely from home. The Board's call center continues to operate at a reduced schedule – from 8:30 a.m. to 1:00 p.m. – but staff remains available during regular business hours from 8:15 a.m. to 5:00 p.m. to respond to emails and ensure processing is completed timely. If you cannot reach us by phone, please feel free to send an email and we will promptly respond.

This issue includes an update on recent disciplinary matters decided by the Board, as well as some notable recent determinations from the Common Interest Community Ombudsman. We also provide an overview of some legislative changes resulting from the 2021 General Assembly Session, including a change to allow associations to conduct board and annual meetings electronically. There is also an update on the Board's regulatory actions, including an action to undertake a review of the licensure regulations for community managers. (See Page #2 for additional details.)

We hope each of you have a safe and enjoyable summer.



Board Update

Due to the surge in COVID-19 cases during last fall, the Board did not hold its meeting in December 2020 as previously scheduled. This past March, the Board met virtually for its first meeting in 2021. The Board also met virtually for its meeting held June 2021. However, as the state of emergency will be ending on June 30, it is expected the Board will return to holding in-person meetings.

During the Board's March meeting, the Board unanimously reelected its Chair, Drew Mulhare, and Vice-Chair, David Mercer, to serve in these positions for this year. The March meeting also served as the final meeting for Board Member Tom Burrell, one of the Board's citizen members, who had served on the Board since 2018. The Board wishes Mr. Burrell happy trails.

On May 7, 2021, the Governor's office announced the appointment of Eileen M. Greenberg of Alexandria to fill the vacancy created by Mr. Burrell's departure. Ms. Greenberg is a board member and Vice-President of the unit owners' association for the Watergate at Landmark Condominium. Ms. Greenberg previously served as a member of the Board's Reserve Study Guidelines Committee in 2019, and helped develop the Guidelines for the Development of Reserve Studies for Capital Components, which was published in September 2019.

There is currently one vacancy on the Board.



Those interested in receiving an appointment to the Common Interest Community Board may submit an application to the Secretary of the Commonwealth at the following website:

<https://www.commonwealth.virginia.gov/va-government/boards-and-commissions/>



Board Undertakes Regulatory Review of Common Interest Community Manager Regulations

At its March meeting, the Board took action to initiate a general review of its Common Interest Community Manager Regulations. These regulations outline the requirements for licensure of common interest community management companies, and certification of principal or supervisory employees of management companies. The regulations establish standards of conduct and practice for both management companies and certificated employees. In addition, the regulations establish requirements for common interest community manager training programs.

As part of the general review, the Board voted to form a regulatory review committee which will be composed of some members of the Board, and members of the public selected in coordination with the Board's Chair. Among the topics the committee is expected to consider are:

- ◆ Repeal of provisions in the regulations that are out-of-date;
- ◆ Entry requirements for common interest community manager licenses, including training and experience standards;
- ◆ Extending the term of licensure from one year to two years;
- ◆ Extending reinstatement periods for licenses and certificates to one year; and
- ◆ Standards of conduct and practice for licensees and certificate holders.

During the regulatory review process, members of the public will be provided opportunities to offer comment on the regulations and any proposed changes.



DPOR Regulatory Waivers to Expire

On March 12, 2020, Governor Ralph Northam declared a state of emergency due to COVID-19, and continued the state of emergency order on May 26, 2020. In this emergency order, Amended Executive Order 51 (EO 51), the Governor directed state agencies to prepare for and mitigate the effects of the outbreak. In doing so, he ordered authorization for the heads of executive branch agencies, on behalf of their regulatory boards as appropriate, and with the concurrence of their Cabinet Secretary, to waive any state requirement or regulation. As a result of this emergency, we currently have several temporary waivers in place (See Page #4). Those waivers affecting the Common Interest Community Board (CIC Board) include:

1. Extending Validity of Expired Licenses, Certificates, and other credentials
2. Waiving Regulatory Restrictions on Online, Distance, and Virtual Learning

Pursuant to § 44-147.17 of the Code of Virginia, EO 51 **will expire on June 30, 2021**. With these changes comes the end of the temporary waivers. As a result, the waivers above **will expire July 31, 2021**.

For those who need to renew or reinstate their license or certificate, the required fee can be paid via check made payable to the Treasurer of Virginia or via credit card on the appropriate form (<https://www.dpor.virginia.gov/FormsAndApplications>). The payment along with a completed renewal application (located at <https://www.dpor.virginia.gov/Boards/CIC-Board>), and any required additional documentation (i.e., proof of CPE, insurance, etc.) can be mailed to:

DPOR
9960 Mayland Drive, Suite 400
Richmond, VA 23233-1485

Please note that failure to complete all requirements for renewal or reinstatement of a license or certificate, including submitting the applicable fee and any required additional documentation, on or before July 31, 2021, may result in the requirement to reapply for licensure or certification.

If you have any questions or need further information, please contact the Board office via email at CIC@dpor.virginia.gov or by phone at 804-367-8510. Please note that the Board's call center is open from 8:30 a.m. to 1:00 p.m. on regular business days. However, emails are responded to at all times between 8:15 a.m. and 5:00 p.m. Thank you for your understanding during these unprecedented times.

About the Newsletter

Common Interests is produced by the staff of the Common Interest Community Board's office. The newsletter does not have an established publication schedule, though staff aims to publish the newsletter at least semi-annually. To receive notification regarding the publication of upcoming editions of the newsletter, please register as a public user at the Virginia Regulatory Town Hall website. Registered users of the site will also receive important updates from the Board, including notices of regulatory action and changes to board-issued documents. To register with Town Hall, visit its website at: <http://townhall.virginia.gov/L/Register.cfm>. Staff also welcomes input from the public regarding topics for upcoming editions of the newsletter. You may submit any ideas for future articles or other suggestions for the newsletter to the Board's email: CIC@dpor.virginia.gov.



Expiring Regulatory Waivers

Expiring June 30, 2021	
Waiver Name: <i>Temporary Waiver of Regulations to Extend Examination Eligibility Deadlines</i>	Effective Date: March 19, 2020 (amended May 27, 2020; and May 6, 2021)
<p>Description: Extends examination eligibility deadlines established by regulations of boards under DPOR that would otherwise expire during the state of emergency, until the 30th day after the date by which the state of emergency is lifted. This waiver does not waive statutory requirements or limitations, nor does it amend any other examination eligibility provisions.</p> <p>The waiver does not apply to licenses, certifications, or registrations issued by the Common Interest Community Board.</p>	
Expiring July 31, 2021	
Waiver Name: <i>Temporary Waiver of Regulations to Extend Validity of Expired Licenses, Certifications, Registrations and Other Authorizations</i>	Effective Date: March 18, 2020 (amended March 24, 2021)
<p>Description: Extends the validity of licenses, certifications, registrations, and other authorizations issued by regulatory boards under DPOR that would otherwise (i) expire during the state of emergency and (ii) be eligible for renewal, extension, or reinstatement during the state of emergency under applicable regulations, until the 30th day after the date by which the state of emergency is lifted. This waiver does not waive statutory requirements or limitations, nor does it amend or permanently extend the previous expiration date of affected licenses, certifications, registrations, and other authorizations.</p> <p>The waiver applies to common interest community manager licenses, principal or supervisory employee certificates, and common interest community association registrations. The waiver also applies to registrations for timeshare alternative purchases and time-share resellers. The waiver does not apply to condominium registrations, time-share program registrations, or time-share exchange program registrations.</p>	
Waiver Name: <i>Temporary Waiver of Regulations that Prohibit or Limit Online, Electronic, or Distance Theoretical Instruction</i>	Effective Date: March 13, 2020 (amended May 27, 2020)
<p>Description: Waives any regulations of regulatory boards under DPOR that prohibit or limit online, electronic, or distance theoretical instruction, in order to prevent and mitigate the spread of the coronavirus (COVID-19). This waiver does not waive statutory requirements or limitations, nor does it waive practical (hands-on) instruction required by a board's regulations.</p> <p>There are no regulations of the Common Interest Community Board which prohibit or limit online, electronic, or distance instruction. Common interest community manager training programs approved by the Board may provide online, electronic, or distance instruction. However, providers are highly encouraged to ensure training is delivered utilizing a platform that allows the instructor to ensure students are in attendance for the duration of the training, and allows a method for questions and answers during the training.</p>	
Waiver Name: <i>Temporary Waiver of Certain Regulations Requiring Physical Presence at Places of Business</i>	Effective Date: November 6, 2020
<p>Description: Waives any regulations of regulatory boards under DPOR that require physical presence at places of business. (With exception to licensees of the Board for Barbers and Cosmetology providing personal grooming services or body art.) This waiver does not waive statutory requirements or limitations, nor does it waive any supervision or management provisions required by a board's regulations.</p> <p>There are no regulations of the Common Interest Community Board that require physical presence at a place of business.</p>	

2021 Legislative Update

On January 13, 2021, the Virginia General Assembly convened for its 2021 regular session. The 30-day regular session adjourned on February 11, 2021. The Assembly convened a special session, which adjourned on March 1, 2021. During these sessions, the Assembly considered and adopted multiple bills affecting common interest communities. The list below includes only those bills that were enacted and directly impact the CIC Board. There may be other legislation affecting common interest communities that are not on this list.

(Note: Except where otherwise indicated, all legislation will become effective on July 1, 2021. Bill information was obtained from the General Assembly's Legislative Information System. Further details on these bills are available at <http://lis.virginia.gov/>.)

Associations/Association Governance

HB 1816/SB 1183 - Property Owners' Association Act; Condominium Act; use of electronic means for meetings and voting.

Summary: Allows meetings of property owners' associations, boards of directors, unit owners' associations, executive boards, and committees to be held entirely or partially by electronic means, provided that the board of directors or executive board, as applicable, has adopted guidelines for the use of electronic means for such meetings. The bill requires that such guidelines ensure that persons accessing such meetings are authorized to do so and that persons entitled to participate in such meetings have an opportunity to do so. The bill grants authority for determining whether any such meeting may be held entirely or partially by electronic means to the board of directors or executive board, as applicable. Under current law, if a meeting of a board of directors or executive board is conducted by telephone conference or video conference, at least two members of the board of directors or executive board, as applicable, are required to be physically present at the meeting place included in the meeting notice. The bill amends the definition of "electronic means" to provide that a meeting conducted by electronic means includes a meeting conducted via teleconference, videoconference, Internet exchange, or other electronic methods. The bill allows members of property owners' associations or unit owners' associations to vote at meetings of such associations by absentee ballot, and allows such members to vote in person, by proxy, or by absentee ballot by electronic means, provided that the board of directors or

executive board, as applicable, has adopted guidelines for such voting. Finally, the bill provides that if a vote, consent, or approval required to be obtained by secret ballot is accomplished through electronic means, the electronic means shall protect the identity of the voter, and provides that if the electronic means cannot protect the identity of the voter, another means of voting shall be used.

HB 1842 - Property Owners' Association Act; Condominium Act; rulemaking authority of property owners' associations and unit owners' associations; smoking.

Summary: Permits (i) except to the extent that the declaration provides otherwise, the board of directors of a property owners' association to establish reasonable rules that restrict smoking in the development, including (a) rules that prohibit smoking in the common areas and, (b) for developments that include attached private dwelling units, rules that prohibit smoking within such dwelling units, and (ii) except to the extent that the condominium instruments provide otherwise, the executive board of a condominium unit owners' association to establish reasonable rules that restrict smoking in the condominium, including rules that prohibit smoking in the common elements and within units. The bill clarifies the authority of executive boards of condominium unit owners' associations to establish, adopt, and enforce rules and regulations with respect to the use of the common elements of the condominium and with respect to such other areas of responsibility assigned to the unit owners' association by the condominium instruments, except where expressly reserved by the condominium instruments to the unit owners. The bill also permits unit owners, by a majority of votes cast at a meeting of the unit owners' association, to repeal or amend any rule or regulation adopted by the executive board. This bill is a recommendation of the Virginia Housing Commission.

Regulatory Actions Update

Recent Regulatory Actions Completed:

Time-Share Regulations - SB 584 Conformance (Exempt Action) (Effective December 1, 2020)

At its September 3, 2020 meeting, the Board voted to initiate an exempt action to amend the Time-Share Regulations to conform to changes in the Virginia Real Estate Time-Share Act (Chapter 22 of Title 55.1 of the Code of Virginia) resulting from the passage of SB 584 during the 2020 General Assembly session.

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Regulatory Actions Update (continued)

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The legislation provided clarification regarding the terms “time-share program” and “time-share project,” particularly as these terms relate to registration of time-share programs and public offering statements. The legislation also clarified that the Act is applicable to certain out-of-state time-shares where the time-share interests are direct or indirect beneficial interests in a trust. The legislation also made other technical changes.

Regulatory Actions In Progress:

Common Interest Community Management Information Fund Regulations - General Review (Final Stage)

In March 2017, the Board initiated a general review of the Common Interest Community Management Information Fund Regulations. The scope of these regulations includes the registration and annual report requirements for community associations. The Board considered proposed amendments to the regulations at its November 2017 meeting. The Board voted to withdraw the action and restart the review to allow for additional public participation through formation of a regulatory review committee.

A regulatory review committee of the Board, consisting of selected Board members and other stakeholders, met on September 27, 2018, to discuss potential changes to the regulations. The committee reviewed and adopted proposed language for amendments to the regulations. At its November 29, 2018 meeting, the Board reviewed and accepted the proposed amendments. In February 2019, the proposed amendments were submitted for review by Executive Branch agencies. Executive Branch review was completed on September 19, 2019. The proposed stage was published in the Virginia Register on October 28, 2019 to commence a 60-day public comment period. A public hearing was held on November 12, 2019. The public comment period ended on December 27, 2019.

At its meeting on March 12, 2020, the Board reviewed the proposed amendments and public comments received. Based on some of the comments received, the Board elected to make revisions to the proposed amendments. The Board adopted the amendments as revised. On May 14, 2020, the amended regulation was filed for Executive Branch review. Upon completion of Executive Branch review, the final regulation will be published in the Virginia Register, and a final 30-day public comment period will be held prior to the amended regulation becoming effective.

Common Interest Community Manager Regulations - General Review (NOIRA)

At its March 4, 2021 meeting, the Board initiated a general review of the Common Interest Community Manager Regulations by voting to authorize the filing of a Notice of Intended Regulatory Action (NOIRA), and the formation of a regulatory review committee. Staff, in coordination with the Board’s Chairman, is undertaking the process to form the regulatory review committee and schedule meeting dates. Staff is also developing the NOIRA, which is anticipated to be filed subsequent to the formation of the review committee. (See Page #2 for more information on this action.)

Further information on these regulatory actions may be found at the Virginia Regulatory Town Hall website (<http://townhall.virginia.gov/>).

Board Revises Guidance on Time-Share Program Public Offering Statements

At its March 4, 2021 meeting, the Board voted to revise its guidance document regarding the delivery of public offering statements for time-share programs. The revisions were made to conform the guidance document to recent amendments to the Virginia Real Estate Time-Share Act resulting from (i) the recodification of Title 55 of the Code of Virginia, which became effective on October 1, 2019, and (ii) statutory changes that became effective on July 1, 2020.

The proposed revised guidance document was posted to the Virginia Regulatory Town Hall for a 30-day public comment period. The comment period began on March 29, 2021, and concluded on April 28, 2021. No comments were received during the public comment period. The revised guidance document became effective on April 29, 2021.

This and other Board guidance documents may be found on the Virginia Regulatory Town Hall website: <https://townhall.virginia.gov/L/GDocs.cfm?BoardID=147>.

Public Comment on Regulatory Actions

The Board welcomes the public’s participation in the regulatory process. Individuals may offer comment on pending regulatory actions, to include proposed regulations or regulation amendments, and proposed guidance documents or guidance document amendments. To sign up to receive notices regarding the Board’s regulatory actions, including notification of public comment periods and to submit comments during a regulatory comment period, visit the Virginia Regulatory Town Hall website (<http://townhall.virginia.gov>). In addition, public comments on regulatory actions may be submitted to the Board directly by mail or by email.

Recent Board Disciplinary Case Decisions

File Number 2019-02440; Association Community Services West, Inc. (ACS West)

Consent Order adopted by the Board on March 4, 2021.

The management company was charged with four violations under a single count for violating the Board's prohibited acts for intentional and unjustified failure to comply with the terms of the management contract, operating agreement, or association governing documents (18 VAC 48-50-190.7).

The company, as managing agent for a condominium unit owners' association, failed to comply with the terms of its management agreement with the association. The company's contract with the association provided that it could not authorize or incur expenses for any one item of repair or replacement in excess of \$500, unless such expense was necessary because of an emergency condition involving serious danger to life or property. On four separate occasions, the company unjustly authorized repairs that did not appear to be due to emergency conditions involving serious danger to life or property.

The management company acknowledged its understanding of the charged regulatory violations, and neither admitted to, nor denied, the violations, but agreed to pay monetary penalties totaling \$600 and board costs in the amount of \$150.

The terms of the order have been met.

File Number 2020-01152; Association Community Services West, Inc. (ACS West)

Consent Order adopted by the Board on March 4, 2021.

The management company was charged with a violation of the Board's prohibited acts for failing to act in providing management services in a manner that safeguards the interests of the public (18 VAC 48-50-190.17).

The company, as managing agent for a condominium unit owners' association, failed to safeguard the interests of the public when the company representative assisting the association in conducting its annual meeting left in the middle of the meeting after it had become contentious; and failed to assist in the computation of all association votes.

The management company acknowledged its understanding of the charged regulatory violation, and neither admitted to, nor denied, the violation, but agreed to pay a monetary penalty of \$1,500 and board costs in the amount of \$150.

The terms of the order have been met.

File Number 2019-00655; DCRE Management, LLC

Decided: March 4, 2021.

Summary: The management company was charged with five violations under a single count for violating the Board's prohibited acts for intentional and unjustified failure to comply with the terms of the management contract, operating agreement, or association governing documents (18 VAC 48-50-190.7).

The first charged violation alleged the management company failed to provide an annual inspection report for each property and lot in the community to the association's board as required by the management agreement (Violation One). The second charged violation alleged the management company failed to abide by the terms of the management agreement when it paid itself a monthly management fee over the authorized amount; and failed to submit detailed monthly invoices to the association's board in accordance with the agreement (Violation Two). The third charged violation alleged the management company failed to abide by the terms of the management agreement by not obtaining binding variations, modifications, or changes to the agreement in writing and executed by both parties pertaining to management fee increases (Violation Three). The fourth charged violation alleged the management company failed to abide by the terms of the management agreement by failing to establish an escrow account that was jointly controlled by the management company and the association following the termination of the management agreement (Violation Four). The fifth charged violation alleged the management company failed to abide by the terms of the management agreement by failing to provide all books and records related materials belonging to the association within three weeks after termination of the management agreement (Violation Five).

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Recent Board Disciplinary Case Decisions (continued)

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An Informal Fact-Finding Conference (“IFF”) was held in February 2021, where a presiding officer on behalf of the Board heard testimony from the principal of the management company, and several representatives from the complaining association. The presiding officer submitted a recommendation to the Board for its consideration at the March 2021 meeting.

As to Violation One, the presiding officer recommended a finding of no violation, as it appeared the management company complied with the management agreement regarding annual inspections.

As to Violation Three, the presiding officer recommended a finding of no violation, as it appeared the management company’s fee increases complied with the management agreement.

As to Violation Four, the presiding officer recommended a finding of no violation, as it appeared the management company did not fail to comply with the provisions of the contract regarding establishment of a jointly controlled escrow account following termination of the agreement. The escrow account contemplated by the contract was for payments due to contractors or suppliers for labor, materials, and services ordered by the managing agent on behalf of the association.

The escrow account established by the management company, which was not set up for joint control, was created to hold funds that were in dispute between the management company and the association over services provided by the management company, and not for payments to vendors.

As to Violation Five, the presiding officer recommended a finding of no violation, as it appeared the evidence did not rise to a level necessary to find a violation. The management company appeared to have turned over most books and records belonging to the association, though there were some omissions. However, the management company’s omission of certain records was not an intentional and unjustified failure.

With respect to Violation Two, however, the presiding officer recommended a finding of a violation of 18 VAC 48-50-190.7. The presiding officer found that the management company’s disbursement of association funds, first to an escrow account, and then ultimately to itself and the company’s principal, after the association

board had terminated the management company’s authorization to disburse funds, and denied approval for payment of funds, was an intentional and unjustifiable violation of the terms of the management agreement. The presiding officer recommended imposition of a monetary penalty of \$1,000.

During the Board meeting, the Board heard from the principal for the management company, and from an association representative who participated at the IFF. The principal of the management company agreed with the recommendations of finding no violation for Violations One, Three, Four, and Five, but did not agree with the recommended finding for Violation Two. The association representative agreed with the recommended finding of a violation for Violation Two, but did not agree with the recommended findings of no violation for Violations One, Three, Four, and Five.

The Board voted unanimously to accept the recommendation of the presiding officer, and found the management company in violation of 18 VAC 48-50-190.7, and imposed a \$1,000 monetary penalty.

The terms of the order have been met.

Copies of the orders issued by the Board for disciplinary cases may be obtained from the Department’s website: <https://www.dpor.virginia.gov/>.



Notable Recent Final Determinations from the Ombudsman

File Number 2021-00189, Kenan v. Retreat at Chancellorsville Homeowners Association

Determination issued on August 12, 2020.

The Complainant (Kennan) alleged the association violated § 55-510.2 (now § 55.1-1816) of the Property Owners’ Association (POA) Act, which states, in part:

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Notable Recent Final Determinations from the Ombudsman (continued)

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A. All meetings of the board of directors, including any subcommittee or other committee of the board of directors, where the business of the association is discussed or transacted shall be open to all members of record. The board of directors shall not use work sessions or other informal gatherings of the board of directors to circumvent the open meeting requirements of this section. Minutes of the meetings of the board of directors shall be recorded and shall be available as provided in subsection B of § 55.1-1815.

B. Notice of the time, date, and place of each meeting of the board of directors or of any subcommittee or other committee of the board of directors shall be published where it is reasonably calculated to be available to a majority of the lot owners.

Kenan alleged the association's board made a decision regarding benches in the community without holding a public meeting where owners would have an opportunity to comment or discuss the bench issue, and failed to provide minutes of its action at the next meeting.

The association responded to Kenan's allegation by citing it had the authority under its bylaws and § 13.1-865 of the Code of Virginia (Virginia Nonstock Corporation Act) to act outside of a meeting.

The Ombudsman determined that she could not find that the association had violated common interest community law. There is nothing in the POA Act that specifies when a board must have a meeting to discuss the potential action it may take. While the POA Act does require notice of all meetings, if there is language in the bylaws that allows a board to act outside of a meeting, the Ombudsman's office cannot make a determination that an action outside of a meeting is improper, since it can neither interpret, nor enforce the governing documents of an association. In addition, the Virginia Nonstock Corporation Act allows for action without a meeting, but the Ombudsman's office cannot interpret or enforce that Act, and therefore cannot determine if it would be applicable or appropriate to the situation.

The Ombudsman noted that it was not clear from the complaint whether the association's board actually held a meeting, or simply took action without a meeting. It

seemed that no meeting was actually held, and, thus, no notice required, and the association took action without a meeting based on the belief it could do so under its own bylaws and the Virginia Nonstock Corporation Act. Without evidence that a meeting actually took place, the Ombudsman's office cannot find that the association failed to provide notice of a meeting.

The Ombudsman further noted that a failure to record minutes of a vote and present them at the next public meeting must be a requirement under either the bylaws or the Virginia Nonstock Corporation Act; however, there is no such requirement in the POA Act. The POA Act requires minutes for a board meeting be recorded, but since the Ombudsman was not able to determine if a meeting was actually held, and because there is no requirement in common interest community law that minutes must be presented at the next public meeting, the Ombudsman could not make a determination that a failure to record or provide such minutes was a violation of the POA Act.

Kenan also made complaints about the decision-making authority of the association's board, and the funding of the benches. These issues were not addressed by the Ombudsman because neither falls under common interest community law, and there was no allegation of a violation of common interest community law related to those complaints.

The Ombudsman determined that no action was required of the association as it pertained to the complaint. However, the Ombudsman found the association did not fully adhere to the Common Interest Community Ombudsman Regulations when drafting its response to the complaint. The Ombudsman noted the response did not include (i) the complainant's right to file a Notice of Final Adverse Decision, as well as the contact information for doing so, and (ii) the association's registration number, as well as the common interest community manager's name and license number; each of which is required under 18 VAC 48-70-50 of the regulations. The Ombudsman advised that future final decisions must include this information.

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Notable Recent Final Determinations from the Ombudsman (continued)

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File Number 2021-00645, Taylor v. Condominium Unit Owners Association of Villas at Peppers Ferry

Determination issued on October 20, 2020.

The Complainant (Taylor) alleged the unit owners association violated § 55.1-1955(A) of the Virginia Condominium Act by using association funds to pay for repairs in private condominium units. Section 55.1-1955(A) of the Act, states, in part:

Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (i) to the unit owners' association in the case of the common elements and (ii) to the individual unit owner in the case of any unit or any part of such unit, except to the extent that the need for repairs, renovation, restoration, or replacement arises from a condition originating in or through the common elements or any apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities. Each unit owner shall afford to the other unit owners and to the unit owners' association and to any agents or employees of either such access through his unit as may be reasonably necessary to enable them to exercise and discharge their respective powers and responsibilities.

Taylor alleged the association used association funds to repair four toilets in two individually owned units after it was found that the water bills for the condominium buildings where the units were located were much higher than usual. An investigation revealed the source of the water usage was faulty toilets. In his complaint, Taylor indicated the condominium instruments (declaration and bylaws) did not contain exceptions that would render the statute inapplicable. Taylor also alleged the association failed to adhere to its bylaws when the decision to have the association pay for the repairs was made.

The association responded to Taylor's complaint by removing the \$176 charge from the association's accounts. According to the association, this meant that no association funds were spent to repair the toilets in the two units.

In her determination, the Ombudsman noted:

While it appears that the Association may have improperly used association funds to pay for repairs to items that are not common elements, this is a situation where this office must weigh in carefully, as the statute that applies is dependent, in part, upon the condominium instruments. This office has no authority to review or interpret governing documents of an association. However, since the Association did not raise the condominium instruments in its response, I will conclude that they play no role in this matter.

The Ombudsman determined that it appeared the association violated § 55.1-1955 of the Act by paying for the repairs out of association funds. The association, though, rectified the situation by removing the charges from the association's accounts. It was not clear how the association removed the charges, and who ultimately paid for them. Taylor's Notice of Final Adverse Determination to the Ombudsman indicated that someone made an anonymous donation to the association, and that these funds were used for payment. The Ombudsman pointed out that it was not up to the Ombudsman's office to determine where the funds came from to pay for the toilet repairs.

The Ombudsman required that going forward the association needs to ensure that it does not misuse association funds, and that it fully complies with the Virginia Condominium Act.

File Number 2021-00757, Long v. Arlington Plantation Property Owners Association

Determination issued on October 21, 2020.

The Complainant (Long) alleged the association violated § 55.1-1807 of the Property Owners' Association (POA) Act, which states, in part:

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Notable Recent Final Determinations from the Ombudsman (continued)

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Every lot owner who is a member in good standing of a property owners' association shall have the following rights:

3. The right to have notice of any meeting of the board of directors, to make a record of any such meeting by audio or visual means, and to participate in any such meeting in accordance with the provisions of subsection G of § 55.1-1815 and § 55.1-1816;

Long alleged the violation occurred when the association failed to provide notice of a meeting that resulted in a "Unanimous Consent Without a Meeting of the Board of Directors" (Unanimous Consent). According to Long, the association's board cancelled a board meeting to be held in early March 2020 due to COVID-19 and subsequently issued the Unanimous Consent. No announcement of a meeting was made regarding the Unanimous Consent.

The association responded to the allegation of failure to comply with § 55.1-1807 by noting that it utilized § 13.1-865 of the Virginia Nonstock Corporation Act when it obtained consent without a meeting, and that consent was confirmed at a later board meeting and placed into the minutes book of the association. The association also indicated that fees, which were the subject matter of the complaint, were discussed in properly noticed meetings of the board.

In her determination, the Ombudsman explained that the very nature of a "unanimous consent without a meeting" is that no meeting is required in order for a board to come to a decision. Unanimous consents are not governed by common interest community law, but, instead, are typically governed by the association's governing documents and the Virginia Nonstock Corporation Act. Since the Ombudsman's office does not have authority over either, a determination could not be provided as to whether it was appropriate to make a decision based on unanimous consent. As to the allegation that no meeting notice was provided of the meeting that led to the unanimous decision, if no meeting was held, there can be no requirement for notice. Since there was no evidence a meeting was held, the Ombudsman found there was no violation of § 55.1-1807(3).

The Ombudsman determined no action was required of the association.

Long also alleged the association violated the covenants of the association. However, those allegations were not ad-

ressed since the Ombudsman's office has no authority to determine if a violation of governing documents has occurred.

File Number 2021-01096, Peery v. Astoria Condominium

Determination issued on December 18, 2020.

The Complainant (Peery) alleged multiple violations of the Virginia Condominium Act by the unit owners' association. Peery's first complaint alleged the association failed to provide a document upon request. Section 55.1-1945 of the Act, states, in part:

B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including the unit owners' association membership list, and addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for a unit owner association managed by a common interest community manager and 10 business days' written notice for a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

Peery, an owner and a member of the association's executive board, requested a copy of the contract between an IT Consultant and the association. Peery said she made the request twice, and both times the request went unacknowledged.

The association responded to this allegation by stating that there was no contract, and, therefore, it could not provide one.

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Notable Recent Final Determinations from the Ombudsman (continued)

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The consultant was working off a retainer. The association did provide Peery with a copy of the invoice from the consultant showing the retainer had been paid.

The association asserted there was no violation of the law, since the document requested did not exist.

In her determination, the Ombudsman noted that it was difficult to determine if the association had violated § 55.1-1945 of the Code of Virginia when it failed to provide a contract to Peery. Under § 55.1-1945, there is no requirement to provide or create a document that does not exist. The association said that there was no contract, and that the consultant was paid a retainer against which he billed. The association provided Peery a copy of the invoice showing the retainer had been paid. If there was no contract between the consultant and the association, the association cannot provide one. Regarding Peery's claim about the association's failure to acknowledge the request for the contract, the Ombudsman stated, "[w]hile courtesy might ask that the Association respond to any request for documents, there is no legal requirement that an association respond to a request for books or records if they do not have the requested documents."

Peery's second complaint alleged that either the association held a meeting without notice or the other board members used email or phone calls to plan for an election at a special meeting held on August 20, 2020. Peery claimed the other members of the executive board violated § 55.1-1949 of the Act, which states, in part:

B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. The unit owners' association may, to the extent that the condominium instruments or adopted rules expressly provide, send notice by electronic means if consented

to by the officer to whom the notice is given. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945.

2. Notice of the time, date, and place of each meeting of the executive board or of any subcommittee or other committee of the executive board, and of each meeting of a subcommittee or other committee of the unit owners' association, shall be published where it is reasonably calculated to be available to a majority of the unit owners.

Peery alleged that board members had planned for the meeting and this was obvious due to the manner in which the meeting was carried out, and that the other members had "...clear roles and responsibilities assigned including who would validate that members were in good standing." Peery alleged the other members violated the Act for meeting without notice or for discussing the special meeting in advance.

In its response, the association stated, "...there is no evidence that any such meeting occurred." The association acknowledged that board members spoke to each other about possible candidates and spoke individually to candidates, but that meeting had been held.

Regarding this allegation, the Ombudsman stated it was impossible for her office to decide the question as to whether there was a meeting held without notice or whether there was some type of interaction between executive board members other than Peery. The Ombudsman's office cannot determine if a meeting was held where the business of the unit owners' association was discussed or transacted, per § 55.1-1949, if no evidence is provided to prove such a meeting took place. The Ombudsman further added:

As to whether board members other than the Complainant may have discussed the special meeting and election via email or telephone, even if they had done so, this is not a violation of the applicable statute.

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Notable Recent Final Determinations from the Ombudsman (continued)



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Emails and phone calls are not meetings, unless the members gathered for a teleconference or possibly, if they were all seated at the same time at their computers and emailing each other.

There was no evidence of either of these situations.

Based on the information provided in the Notice of Final Adverse Determination, the Ombudsman agreed that if the special meeting and election progressed as described by Peery, it might appear that there was prior planning of the meeting and that planning may have been done during an unnoticed meeting.

However, she could not find a violation of § 55.1-1949 if it cannot be proven such a meeting took place.

Peery's final complaint alleged the association, its common interest community manager, and its legal counsel violated § 54.1-2354.4 of the Code of Virginia by failing to respond to an association complaint submitted by Peery in accordance with the Common Interest Community Ombudsman Regulations. Peery claimed that actions by the common interest community manager and legal counsel were improper or coordinated; and that there was an incorrect address for the management company in the complaint procedure.

The association did not fully respond to the complaint, but noted that it heard the complaint and that no further action would be taken regarding Peery's assertion.

As to Peery's final complaint, the Ombudsman noted Peery was correct that the association failed to respond to Peery's association complaint in accordance with the Common Interest Community Ombudsman Regulations. However, this failure was addressed, as evidenced by the Notice of Final Adverse Determination and the inclusion of the complaint within it, after the association was advised by the Ombudsman's office to respond to Peery's complaints. The Ombudsman further noted that although Peery included the association's legal counsel and management company in her allegations, it is ultimately the responsibility of the executive board, not that of the manager or legal counsel, to carry out the com-

plaint process. In addition, the Ombudsman's office has not authority over any attorney, and any jurisdiction over the common interest community manager would be only to the extent there is a violation of the Common Interest Community Manager Regulations.

The Ombudsman determined no action was required of the association.

File Number 2021-01875, Tobin v. Quaker Hill Community Association

Determination issued on April 13, 2021.

The Complainant (Tobin) alleged the association failed to comply with § 55.1-1816 of the Property Owners' Association (POA) Act, which states, in part:

B. Notice of the time, date, and place of each meeting of the board of directors or of any subcommittee or other committee of the board of directors shall be published where it is reasonably calculated to be available to a majority of the lot owners.

A lot owner may make a request to be notified on a continual basis of any such meetings. Such request shall be made at least once a year in writing and include the lot owner's name, address, zip code, and any email address as appropriate. Notice of the time, date, and place shall be sent to any lot owner requesting notice (i) by first-class mail or email in the case of meetings of the board of directors or (ii) by email in the case of meetings of any subcommittee or other committee of the board of directors.

Tobin alleged the association failed to provide him continual notice of committee meetings. Tobin acknowledged he has received notice of board meetings, but stated that over the past several years he had "...never been informed of any meetings of the board's committees or subcommittees or instances in which someone implements the responsibilities of a committee or subcommittee."

In its response, the association stated that it agreed with Tobin that Tobin had the right to have notices of committee meetings and would be providing committee meeting notices to him. The association noted that no committee meetings have been held since Tobin's request for notice.

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Notable Recent Final Determinations from the Ombudsman (continued)

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Tobin also alleged the association failed to comply with § 55.1-1817 of the POA Act, which requires the board of directors of an association to “...establish a reasonable, effective, and free method, appropriate to the size and nature of the association, for lot owners to communicate among themselves and with the board of directors regarding any matter concerning the association.” Tobin contends that he does not consider the bulletin board at the community center to be an effective method of communication among owners.

The association responded that it disagreed with Tobin’s allegation. The association stated it provides two methods of communication. Members can have information posted on a bulletin board at the clubhouse, and owners can have information posted on the association’s website. The association considers these methods sufficient but is considering other options and will alert owners if it decides to utilize a different method of communication.

In her determination, the Ombudsman noted that information in the Notice of Final Adverse Decision was conflicting and insufficient to determine if any committee or subcommittee meetings had been held, and whether Tobin was provided notice of such meetings. For this reason, the Ombudsman concluded there may have been a failure to provide notice to Tobin, and asked the association to ensure Tobin is provided the continuing notice for all meetings he has requested.

As to the association’s methods for communication, the Ombudsman stated the following:

While bulletin boards are a common method of communication in associations, and an acceptable one, I would note that if the bulletin board is locked, it would seem to limit the ability of owners to communicate effectively with one another, since communication must be dependent upon someone else posting items in a timely manner. This office has also previously noted that multi-page documents cannot be seen in their entirety if posted in a locked bulletin board. Posting on a website is another method often used by associations, but requiring submission of the items to be posted rather than allowing for direct posts may limit the

opportunity for owners to truly communicate “among” themselves, as required by the Act. Because the Property Owners Association Act does not define reasonable and effective, two key terms contained in the statute that addresses communication, this office cannot define those terms either.

The Ombudsman requested the association to continue, if it has not yet concluded it, its research into optional methods of communication, with a specific effort to find a method that would allow owners to more fully communicate among themselves.

The Ombudsman made a further determination regarding the association’s handling of Tobin’s complaints. In its response to the Ombudsman, the association stated that because it agreed with Tobin that Tobin should be provided notice of committee meetings, it did not consider the formal complaint process necessary. The Ombudsman did not agree with this approach. Once an association complaint has been submitted through the association complaint procedure, the association complaint process is triggered and all aspects of it must be followed, even if the association agrees with the complainant’s concerns or requests. Further, the Ombudsman noted that in the Notice of Final Adverse Decision, there was an email indicating the association was going to consider Tobin’s complaint in an executive session. The Ombudsman was not sure whether this occurred, but reminded the association that it can only meet in association if its reason for doing so falls under the permissible reasons for entering executive session. On this issue, the Ombudsman stated, “Generally, unless association’s counsel is present for consultation, NFADs should be held in open meetings with proper notice to the membership and of course, the complainant.”

The Ombudsman required that the association make certain it provides continuing notice to Tobin of any meetings, and asked the association to consider other methods of communication that would more fully provide for communication among owners. The Ombudsman further required the association to ensure that includes the association’s registration number, and the name and license number of the common interest community manager on any future final decisions as required by 18 VAC 48-70-50 of the Common Interest Community Ombudsman Regulations.

Board and Meeting Information

CIC Board Membership

The CIC Board is composed of 11 members appointed by the Governor. Board members' terms are four years and a member can serve up to two terms. The *Code of Virginia* stipulates that the Board's membership is composed of:

- Three (3) representatives of common interest community managers
- One (1) attorney whose practice includes representing associations
- One (1) CPA who provides attest services to associations
- One (1) Time-Share Industry Representative
- Two (2) Representatives of Developers of CICs
- One (1) Citizen Serving/Served on Self-Managed Association Governing Board
- Two (2) Citizens Residing in Common Interest Communities

The Director of the Department of Professional and Occupational Regulation is designated by statute as the Secretary of the CIC Board, but is not a voting member of the Board.

Drew R. Mulhare (Community Manager) First four-year term ends June 30, 2022 Board Chair	David S. Mercer (Attorney) First four-year term ends June 30, 2023 Board Vice-Chair	Maureen A. Baker (Community Manager) First four-year term ends June 30, 2024
Jim Foley (Community Manager) First four-year term ends June 30, 2023	Eileen M. Greenberg (Citizen Serving on an Association Board) Unexpired term ends June 30, 2022	Amanda Jonas (Developer) First four-year term ends June 30, 2022
Lori Overholt (Time-Share Industry) Second four-year term ends June 30, 2024	Anne M. Sheehan (CPA) Unexpired term ends June 30, 2021	Scott E. Sterling (Developer) Second four-year term ends June 30, 2023
Katherine E. (Katie) Waddell (Citizen Residing in a CIC) First four-year term ends June 30, 2021	Vacant (Citizen Residing in a CIC)	Mary Broz-Vaughan Director, DPOR Board Secretary (Ex officio/Non-voting)

CIC Board Staff

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- ◆ Tanya Pettus
Administrative Assistant
- ◆ Lee Bryant
Program Administration Specialist
- ◆ Ben Tyree
Licensing Specialist

2021 Meeting Dates **

March 4, 2021 @ 9:30 a.m.

June 3, 2021 @ 9:30 a.m.

September 23, 2021 @ 9:30 a.m.

December 2, 2021 @ 9:30 a.m.

Note: As needed the Board will convene meetings of its Training Program Review Committee. These meetings typically take place on the afternoon preceding a scheduled board meeting date.

**** Due to the current public health emergency, the schedule listed above is subject to change, to include the re-scheduling or cancellation of scheduled meetings. Notification regarding changes to scheduled meetings will be posted to the Virginia Regulatory Townhall (<https://townhall.virginia.gov/>).**



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